In the
United States Circuit Court of Appeals
For the Ninth Circuit

No. 6855

LUTHER WEEDIN, as United States Comissioner of Immigration at the Port of Seattle, Washington,

Appellant,

vs.

UNG SUE CHU,

Appellee.

Upon appeal from the District Court of the United States for the Western District of Washington, Northern Division.
Honorable Jeremiah Neterer, Judge.

BRIEF OF APPELLANT

ANTHONY SAVAGE,
United States Attorney,

HAMLET P. DODD,
Assistant United States Attorney,

Attorneys for Appellant

Office and Postoffice address:
310 Federal Building, Seattle, Washington.

JOHN F. DUNTON,
United States Immigration Service,
Seattle, Washington,

On the Brief.

MERCANTILE PTG. & ADV. CO.

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STATEMENT OF THE CASE.

The appellee, UNG SUE CHU, alias UNG SUEY CHU, is of the Chinese race and claims to have been born in China on a Chinese date equivalent to November 2, 1910. He never resided in the United States. He came from China on the steamer

"President Cleveland," arriving at the Port of Seattle, Washington, September 22, 1931, and applied for admission into the United States as a minor son of UNG BING QUONG, a lawfully domiciled Chinese merchant. He was accorded hearings before a Board of Special Inquiry at the Seattle, Washington, Immigration Station, and his application for admission was denied by the said Board of Special Inquiry. Thereafter he appealed from the said decision to the Secretary of Labor, his appeal was dismissed by the Secretary of Labor and his return to China was directed. Thereafter a petition for a Writ of Habeas Corpus was filed in the District Court of the United States for the Western District of Washington, Northern Division. After a hearing on an Order to Show Cause why a Write of Habeas Corpus should not issue, such writ was granted by the Honorable Jeremiah Neterer, District Judge, and subsequently a Judgment and Order discharging the said UNG SUE CHU was entered. The United States Commissioner of Immigration duly filed his notice of appeal and proceedings to perfect said appeal were duly instituted.

ASSIGNMENTS OF ERROR

"I. The Court erred in holding and deciding that a Writ of Habeas Corpus be awarded to the

above-named UNG SUE CHU."

"II. The Court erred in ordering and adjudging that the above-named UNG SUE CHU be discharged from the custody of LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seattle, Washington."

"III. The Court erred in holding and adjudging that the above-named UNG SUE CHU was not subject to exclusion and deportation, but was entitled to come into, and remain in, the United States."

ARGUMENT

The mercantile status of the alleged father, UNG BING QUON (or QUON), the claimed relationship, and the claimed minority of UNG SUE CHU were conceded by the immigration officials. The application for admission was denied for the reason that the said UNG SUE CHU had not presented to the Board of Special Inquiry a passport, or any official document in the nature of a passport, visaed or authenticated by an American consular officer, or a visaed affidavit prepared on application form of the State Department for non-immigrant visas, or any consular visa of any discription, as required by (1)

Rule 2, Par. 2-A of the rules governing the admission of Chinese issued by the Secretary of Labor October 1, 1926; (2) Rule 3, Subdivision F. Par. 2, of the Immigration Rules issued by the Secretary of Labor January 1, 1930; (3) Paragraph II of the President's Proclamation of February 21, 1928, designated as Executive Order No. 4813.

On the appeal to the Secretary of Labor and before the District Court counsel contended that, as a matter of law, wives and minor children of Chinese merchants are not required to present any of the papers prescribed in the rules and proclamation cited above, and that their right to admission into this country is guaranteed by the Treaty with China, without presentation of any such papers. In support of his contention he cited the cases of *Mrs. Gue Lim* (176) U. S. 459) *and Cheung Sum Shee et al.* (268 U. S. 336, 45 S. Ct. 539).

The decision in the case of *Mrs. Gue Lim* has no application to the present case, inasmuch as it was made in 1899 and the sole question before the court was whether or not the wives and minor children of merchants were required to present the certificate prescribed for merchants by Section 6 of the Act of 1882-1884 (22 Stat. L. 58; 23 Stat. L. 115), *in order to be admissible.*

From the enactment of the Act of May 26, 1924 (43 Stat. 153), until the decision in the *Cheung Sum Shee case* May 25, 1925, it was held by the Departments of State and Labor that the wives and minor children of Chinese merchants were *mandatorily excluded* by Sections 5 and 13 (c) of said Act. Consequently, as a matter of course, no regulations were made as to the presentation of any papers by such persons, and the opinion of the Supreme Court in said case shows that no such issue was before the said Court, the sole question certified being: "Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1, 1924, such wives and minor children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?" (*Said Act contains nothing as to what papers are to be presented by persons having a non-immigrant status.*)

Section 24 of the Immigration Act of 1924 (8 U. S. C. A., Sec. 222) provides:

"The Commissioner General with the approval of the Secretary of Labor, shall prescribe rules and regulations for the enforcement of the provisions of this act; but all such rules and regulations, in so far as they relate to the administration of this act by consular officers, shall be prescribed by the Secretary of

State on the recommendation of the Secretary of Labor."

Department of Labor Circular 55266/General of July 1, 1924, reads as follows:

"CHINESE RULES AND REGULATIONS UNDER THE IMMIGRATION ACT OF 1924.

"The following regulations are issued for the guidance of field officers in enforcing the provision of the Act of Congress entitled 'Immigration Act of 1924' in so far as it relates to persons of the Chinese race."

* * * * * * * * * *

"Merchants now in the United States, as well as those merchants who arrive after July 1, 1924, cannot have their wives and alien children admitted to them, unless such relatives are admissible by virtue of their own status. This is made necessary because of the express inhibition against their coming to the United States as found in Paragraph (c) of Section 13 and that portion of Section 5 which reads as follows: 'An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration."

Department of Labor Circular No. 55266/General, dated August 7, 1924, issued in explanation of De-

partment of Labor Chinese General Order No. 4 of the same date, reads the same as the foregoing ,with the exception that the words "which tells what classes of persons ineligible to citizenship may be admitted" are inserted after "Section 13."

August 14, 1925, after the decision of the Supreme Court in the *Cheung Sum Shee* case, the Second Amendment to Chinese General Order No. 4 was issued by the Secretary of Labor, reading as follows:

"Subject: WIVES AND MINOR CHILDREN OF CHINESE MERCHANTS RESIDENT IN THE UNITED STATES OR ENTITLED TO ENTER UNDER SECTION 3 (SIX) OF THE IMMIGRATION ACT OF 1924."

"In view of the recent Supreme Court decision relative to the right of admission of the above-named class of Chinese aliens, the Department of State, with the approval of the Department of Labor, has furnished its consular officers in China with the following instructions, which should be adhered to by the officers of this Service in handling the classes of aliens therein mentioned:

'In view of recent Supreme Court decision it is deemed that wives and minor children of Chinese merchants resident in United States or entitled to enter under Section three (six) of Immigration Act of 1924, are themselves entitled to enter in same class. Grant

visas accordingly. Such Chinese wives and minor children must use visaed affidavits instead of passports or Section six certificates. Minor children under sixteen may be included in mother's affidavit. Chinese wives and minor children entering under Section three (two) must have separate Section six certificates as heretofore. Chinese wives of American citizens are not admissible under Section four (a). Repeat to all consular officers in China.'

"Chinese General Order No. 4 dated August 7, 1924, and letter in explanation thereof of the same date are amended accordingly."

Rule 2, Par. 2, Sec. 2-A of the Department of Labor Rules of October 1, 1926, governing the admission of Chinese, reads as folows:

"Chinese merchants coming solely to carry on trade under and in pursuance of treaties of commerce and navigation are required to present Section 6 certificates, together with non-immigrant Section 3 (6) visas. If their alien wives and minor children accompany the husband and father they must present upon arrival at the port an affidavit, which need not be visaed, but must be prepared upon the application form of the State Department for non-immigrant visa. If such alien wives and minor children do not accompany the husband and father they must present upon arrival at the port a duly visaed affidavit, prepared under the State Department form mentioned in the preceding sentence. Children under 16 years of age, if accom-

panied by the mother, may be included in her affidavit. The lawful alien wives and minor children of Chinese merchants lawfully resident in the United States prior to July 1, 1924, should present upon arrival the same documents *described in the preceding paragraph*, depending upon whether they accompany the husband and father on his return from a visit abroad or are coming to the United States to join him. * *"

Chinese General Order No. 17, issued by the Secretary of Labor June 27, 1930, Par. 2, Sec. 2-A, reads the same as the foregoing with the exception that the words "*described above*" are substituted for the words "*described in the preceding paragraph.*" This Order is still in force.

Rule 3, Subdivision F, Paragraph 2, of the Immigration Rules issued by the Secretary of Labor January 1, 1930, *still in force*, provides as follows:

"No alien shall be admitted to the United States as a non-immigrant unless such alien shall present to the proper immigration official, at the port of arrival, a passport or official documents in the nature of a passport issued by the government of the country to which he owes allegiance and duly visaed and authenticated by an American consular officer: *Provided.* That non-immigrant citizens of Canada, Newfoundland, Bermuda, the Bahamas, and British possessions in the Greater Antilles or British subjects domociled therein or non-immigrant citizens of St. Pierre, or Miquelon, or French citizens domociled therein, or non-immi-

grant citizens of Panama, Mexico, Cuba, Haiti, or the Dominican Republic, if otherwise admissible, shall be permitted to enter the United States without a passport visa."

The Act of May 22, 1918 (40 Stat. 559, 22 USCA, Secs. 223-226) conferred on the President, when the United States was at war, the duty to prescribe rules and regulations concerning the entry of persons into, and their departure from, the United States. This Act was extended by the Act of March 2, 1921 (41 Stat. 1217, 22 USCA, Sec. 227), which contained a provision "That the provisions of the act approved May 22, 1918, shall, in so far as they relate to requiring passports and visas from aliens seeking to come to the United States, continue in force and effect *until otherwise provided by law.*"

Under authority of these Acts the President issued various Executive Orders, among same being those of January 12, 1925, July 12, 1926, and February 21, 1928, all of which provided as follows with respect to non-immigrant aliens:

"With the exceptions hereinafter specified, they must present passports or official documents in the nature of passports issued by the governments of the countries to which they owe allegiance, duly visaed by consular officers of the United States."

Executive Order 4476 issued July 12, 1926, authorized the Secretary of State and the Secretary of Labor to make such additional rules and regulations, not inconsistent with said Order and the Immigration Act of 1924, and Executive Order 4813, issued February 21, 1928, contained the same authorization. The present petitioner does not come within any of the classes of aliens excepted from the provisions of said Orders.

No. 926 General Instruction Consular (Diplomatic Serial No. 273), Sec. II, Paragraph 23, Page 17, issued by the Department of State March 23, 1929, provides:

"The applications of Chinese for visas should be handled in accordance with the special procedure governing the granting of visas under the Chinese Exclusion laws and the general procedure governing the granting of visas to all aliens. It should be borne in mind that a particular Chinese might be admissible under the Immigration Acts of 1917 and 1924, but he might not be admissable under the Chinese exclusion laws or *vice versa.* (See Art. XXII, Consular Regulations.)"

Article XXII, Consular Regulations, Sec. 372, Note 8, provides:

"* * * As a wife of a merchant admitted prior to July 1, 1924, or of a merchant admitted under Sec-

ion 3 (6) of the Immigration Act of 1924, who desires to join her husband in the United States and to reside therein, has no status upon which a Section Six certificate could properly be issued, (*U. S. v. Mrs. Gue Lim*, 176 U. S. 459), a duplicate Form 257 should be prepared (including her and her accompanying minor children, if any), visaed and furnished to her for presentation at the port of entry. *Such a form should likewise be prepared, visaed, and used in the case of a minor child of this class not accompanied by its parents.*" (*Italics ours*).

Inasmuch as the present appellee did not accompany either of his parents from China, it was necessary, under the provisions of Rule 2, Par. 2, Sec. 2-A, Chinese General Order No. 17, and the above Consular Regulation, that he present on arrival at Seattle a duly visaed affidavit (Form 257) in order to be admissible, if found so in other respects.

Various courts have held that a passport visa is a condition precedent to entry into the United States of a non-immigrant:

U. S. ex. rel. London v. Phelps (CCA), 22 F (2d) 288.

U. S. ex. rel. Graber v. Karnuth (CCA), 30 F (2d) 242.

U. S. ex rel. Komlos v. Trudell (CCA), 35 F (2d) 281.

Goldsmith v. United States (CCA), 42 F (2d) 133.

See also *Koyama v. Burnett*, 8 F (2d) 940. (this court).

If such requirement is not in derogation of the treaty rights of the citizens of 24 other countries with which the United States has treaties of commerce and navigation (which apparently it is not), we are totally unable to see any merit in the contention that the terms of the treaty with China preclude the requirement that the specified papers be presented by non-immigrant citizens of that country, and that the Rules and Regulaions prescribing same, made under the same authority, are null and void.

It appears that the appellee applied for a visa at Hongkong and was refused same by the American Consul General at said port January 22, 1931, for the reason that "Serious doubts exist as to the claimed relationship:" See "Notification of the Refusal of Visa." It also appears that he later went to Shanghi, but did not make any application for a visa to the American Consulate there, and, in some manner, about seven months after he had been refused a visa at Hongkong, boarded the steamer "President Cleveland" on which he arrived at Seattle.

Article XXII, Consular Regulations, Section 372, Note 34, provides:

"The burden of proof is upon an applicant for a visa to show that he is entitled to enter the United States or territory under its jurisdiction.'
and Note 36 provides:

"Since it is the duty of the officer to determine whether the visa should be granted, it is clear that the Department can not precisely prescribe the evidence that must be considered in order properly to handle a particular case. In general,it may be said that, in each case, such an investigation must be made as will enable the principal officer to decide with confidence whether the visa should be granted. The economic nature of legislation affecting Chinese immigration into the United States and territory under its jurisdiction should be constantly kept in the foreground."

No. 926 General Instruction Consular (Diplomatic Seriel No. 273), issued March 23, 1929, provides, page 69, Paragraph 195:

"Doubtful Cases:

"With the responsibility and authority placed upon consular officers by section 2 (f) of the act, there is no longer any reason to grant an immigration visa to an applicant whose admissibility is doubtful simply because he insists upon it. The intent of Congress is clear on the point of reducing to a minumum the number of aliens to be excluded after their arrival in the United States and forced to make the return journey to their homes. Therefore, if the consul has reason to believe that an applicant is not admissible to the Unit-

ed States under the immigration laws, he must discharge the responsibility placed upon him by Congress and refuse to issue the immigration visa."

Letter from American Consul Harold Shantz, at Hongkong, dated October 21, 1930 expressed the opinion that the present appellee did not appear to be a minor, and requested that he be furnished a transcript of the family record of his alleged father, UNG BING QUON. Such record was furnished in letter of December 11, 1930 (p. 7 of the record, and apparently was the basis on which the consul arrived at the conclusion that there was serious doubt as to the claimed relationship (See. p. 40 of the record). It appears from the record that, before final action was taken by the Secretary of Labor affirming the decision of the Board of Special Inquiry, the matter of waiving the visa was taken up with the Department of State, and that the Department of State refused such waiver (See letter from said Department dated December 28, 1931, pp. 42-41 of the record), holding that it did not appear that the Consul General had acted improperly in declining to issue the visa.

In deciding the case of *U. S. ex rel. London v. Phelps* November 1, 1927, the Circuit Court of Appeals for the Second Circuit said:

"* * * It is urged that, even if a visa was lawfully imposed as a condition upon a non-immigrant's entry, the giving of a visa is a ministerial act, which the consul was bound to perform, and consequently the court should regard its omission as immaterial. With this we cannot agree. Certainly the giving of a visa is not merely a ministerial act, because some inquiry on the spot, some determination of fact, is essential. It is to show that he is entitled toenter the United States or admitted that the consul may withhold his visa if he believes the passport not to be genuine, or not in the hands of the rightful holder. The instructions of the Secretary of State which supplement the Executive Order, also require the consul to 'satisfy himself of the temporary nature of the visit' of the alien. Whether the consul has acted reasonably or unreasonably is not for us to determine. Unjustifiable refusal to visa a passport may be ground for diplomatic complaint by the nation whose subject h a s been discriminated against. See Moore's Digest, 996. *It is beyond the jurisdiction of the court.* (Italics ours).

As the relator had no visaed passport, her exclusion was proper, and the order discharging the writ is afirmed."

See also *U. S. ex rel. Graber et al. v. Karnuth* (DC), 29 F (2d) 314, affirmed (CCA 2) 30 F (2d) 242.

In the case of *U. S. ex rel. Ulrich v. Kellogg*, 30 F (2d) 984, the Court of Appeals of the District of Columbia said:

"* * * Under the provisions of sections 2 (a) of the Immigration Act of 1924, supra (8 USCA, Sec. 202 (a), the authority to issue a visa is committed to 'consular' officers. And by Section 2 (f) of the same act it is provided as follows:

'No immigration visa shall be issued to an immigrant if it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that the immigrant is inadmissible to the United States under the immigration laws, nor shall such immigration visa be issued if the application fails to comply with the provisions of this act, nor shall such immigration visa be issued if the consular officer knows or has reason to believe that the immigrant is inadmissible to the United States under the immigration laws.' (8 USCA, Sec. 202 (f).

"We are not able to find any provision of the immigration laws which provides for an official review of the action of the consular officers in such case by a cabinet officer *or other authority.* * * *" Italics ours)

Certiorari was denied in this case (49 S. Ct. 482, 279 U. S. 868, 73 L. Ed. 1005).

CONCLUSION.

The above requirements as to the class of papers which must be secured and presented to the immigration officials by alien Chinese wives and minor children of Chinese merchants were prescribed under law-

ful authority, are not inconsistent with the law, and consequently have the force of law. Such documents have no relation to the certificate specified in Section 6 of the Act of 1882-1884, or to the questions decided by the Supreme Court in the cases of *Mrs. Gue Lim* and *Cheung Sum Shee.* They are simply a substitution for the visaed passport or official document in the nature of a passport exacted of non-immigrants who come from countries which issue such papers to their citizens, and their requirement constitutes no setting aside or invasion of any rights under the treaty with China. The appellee did not present the document required to be presented by a minor child of a Chinese merchant unaccompanied by a parent, and consequently was properly excluded by the immigration authorities. The District Court was in error in granting the Writ of Habeas Corpus and ordering him released from the custody of the Commissioner of Immigration, and its order should be reversed.

Respectfully submitted,

ANTHONY SAVAGE,
United States Attorney,

HAMLET P. DODD,
Assistant United States Attorney,

Attorneys for Appellant

JOHN F. DUNTON,
United States Immigration
Service,

On the Brief.